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Zecon Capital Ventures Sdn Bhd v Affin Hwang Investment Bank Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(A)-1787–09 OF 2019
KAMALUDIN MD SAID, HADHARIAH SYED ISMAIL AND SUPANG LIAN JJCA
17 SEPTEMBER 2021

C

Land Law — Charge — Order for sale — Appeal to set aside order for sale — Whether there was misdirection of law — Whether test of 'cause to the contrary' or 'in the circumstances seems just' applied in Sarawak — Whether order
D *for sale should be set aside — Whether trial judge had wide discretionary jurisdiction — Whether charge was valid — National Land Code s 256 — Sarawak Land Code s 148*

Land Law — Charge — Validity of charge — Appellant challenged validity of
E *charge on grounds of misrepresentation, undue influence and total failure of consideration — Whether claims premised on hearsay evidence — Whether respondent's conduct was unconscionable — Whether charge was valid*

F *Statutory interpretation — Construction of statutes — Conflicting statutes — Whether trial judge erred in interpretation and application of s 148 of the Sarawak Land Code — Whether test of 'cause to the contrary' or 'in the circumstances seems just' applied in Sarawak — Construction of statutes — National Land Code s 256 — Sarawak Land Code s 148*

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This was an appeal by the appellant against the decision of the High Court on 11 September 2019 in granting the respondent's application for an order for sale of the appellant's land ('said land'). The appellant had raised two legal points in the appeal. First, the learned judicial commissioner erred in his
H interpretation and application of s 148 of the Sarawak Land Code ('the SLC'). His Lordship also misdirected himself by adopting and applying the provision 'cause to the contrary' of s 256 of the National Land Code ('the NLC') instead of the provision of 'in the circumstances seems just' of s 148 of the SLC and erred in holding that there was no merit in the arguments of the appellant and
I thereby granting an order for sale of the said land. The learned judicial commissioner ought to have appreciated that s 148 of the SLC conferred the court with a wider discretion to consider the justice of the case than s 256 of the NLC and accordingly ought to have applied the wide discretionary jurisdiction and found, with all the materials adduced by the appellant before the court,

that it was not 'in the circumstances seems just' to grant an order for sale. Second, the learned judicial commissioner erred in holding that the appellant's claims of fraud, misrepresentation, under influence and total failure of consideration for the charge were premised solely on hearsay evidence when the said claims were substantiated by contemporary documentary evidence and the valuation report. The facts of the case were that by a letter of award dated 26 April 2013, Jabatan Kerja Raya Malaysia awarded to Zecon Bhd ('borrower') the contract for the construction and completion of Hospital Petra Jaya, Kuching, Sarawak ('project') for the contract sum of RM495m. By a letter of offer dated 27 September 2013, supplemental letters of offer dated 9 December 2013 and 10 December 2013 respectively and the facilities agreement dated 27 December 2013, the respondent and two other banks (Bank Pembangunan Malaysia Bhd and Affin Bank Bhd) granted the bank guarantee, revolving credit and letter of credit facilities in the total sum of RM165m ('existing syndicated facilities') to the borrower for the purpose of part financing the construction and completion of the said project. It was agreed between the respondent and the two aforesaid banks ('syndicated lenders') and the borrower that the existing syndicated facilities would be secured by several charges, assignments and guarantees. The appellant was not a security party for the existing syndicated facilities and the appellant's said land was not a security for the existing syndicated facilities. After the execution and perfection of the aforesaid facilities and securities documents, from 2013 until 2016, the respondent issued the bank guarantee in respect of the said project, released the revolving credit facility to the borrower and allowed partial drawdown of the letter of credit facility. On 9 January 2017, the appellant charged the said land to the respondent. The execution and purpose of this charge was a contentious issue before the High Court. The appellant contended the charge was intended as a security for additional facility of RM30m that the borrower had applied from the respondent and which the respondent did not grant. On the other hand, the respondent alleged the charge was additional security for the existing syndicated facilities of RM165m. The borrower defaulted its repayment to the respondent. By a letter dated 7 September 2018 from the respondent to the borrower, the respondent demanded all monies due and owing under the syndicated facilities. By a letter dated 26 September 2018, the respondent through its solicitors gave 30 days' notice to the appellant demanding payment of the outstanding sum of RM104,362,841.77 as at 7 September 2018 together with interest. There was no payment made by the appellant. The respondent filed an originating summons in the Kuching High Court for an order for sale of the appellant's charged land under s 148(2)(c) of the SLC and O 83 of the Rules of Court 2012. The appellant opposed the respondent's originating summons on the ground that the charge was executed under misrepresentation, undue influence and total failure of consideration. The High Court allowed the respondent's originating summons and granted the order for sale. On appeal, the issues to be determined were: (a) whether the learned judicial commissioner had erred in

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law and misdirected himself by adopting and applying the provisions of s 256 of the NLC instead of s 148 of the SLC; (b) whether the NLC was applicable in the state of Sarawak; and (c) whether the charge obtained by the respondent was procured by means of fraud, misrepresentation and total failure of consideration and whether such charge was valid.

Held, allowing the appellant's appeal with costs:

(1) It was a fact that: (a) the wordings of s 256 of the NLC and s 148 of the SLC were different; (b) the wordings of the former and the latter were clear; (c) s 256 of the NLC was applicable to courts in West Malaysia only whilst s 148 of the SLC was applicable to courts in Sarawak; (d) the phrase 'cause to the contrary' applied to s 256 of the NLC and the words 'as in the circumstances seems just' applied to s 148 of the SLC; and (e) the interpretation of s 148 of the SLC has been established by the apex court. It was this court's view that the courts in Sarawak must first acknowledge these differences and accept the fact that s 256 of the NLC with the 'cause to the contrary' test was not applicable in Sarawak. Therefore, the courts in Sarawak had no option, but to apply the 'as in the circumstances seems just' test in s 148 of the SLC (see para 22).

(2) The court found that the learned judicial commissioner had failed to apply the test of 'as in the circumstances seems just' and instead, applied the test of 'cause to the contrary'. The learned judicial commissioner thus had erred in law and misdirected himself by adopting and applying the test under s 256 of the NLC which was not applicable in Sarawak. This was a material error of law which tantamount to a misdirection in law. On this ground alone, the decision was plainly wrong and must be set aside (see para 25).

(3) The averments in paras 9–10 of Hj Zainurin's affidavit dated 27 December 2018 were not hearsay simply because of the preceding words 'I was informed'. Contrary to the respondent's contention, these words showed that the deponent had received direct information or feedback from his colleague about the meeting and discussion between the appellant's agents and the respondent's officers that had taken place at the respondent's place on 6 December 2016 and such occurrence was proven to be true. Thus, the court found that the learned JC had taken a simplistic approach on this issue without even considering its importance to the appellant's case that the charge was created as security for the additional facility of RM30m requested (see para 30).

(4) The evidence showed that it was the appellant who offered to create a charge for additional facilities of RM30m. The appellant never agreed to create a charge as additional security for the syndicated facilities of RM165m. The respondent contended they required the charge as an additional security for the syndicated facilities but failed to produce any

letter to support such request. The charge came about because it was the appellant who approached the respondent, hopeful to get the additional facility of RM30m armed with property worth more than RM100m to offer as security because they were in dire need of money to complete the project. By their conduct of concealing their true intention of not granting the RM30m but wanting the charge, we find the respondent had acted unconscionably towards the appellant. The transaction was unfair and unjust to the appellant. A charge obtained by means of misrepresentation, undue influence and total failure of consideration was not a valid charge. Based on evidence before the court, it was not just in the circumstances to grant an order for sale (see para 34).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi pada 11 September 2019 yang membenarkan permohonan responden untuk mendapatkan perintah jualan tanah perayu ('tanah tersebut'). Perayu telah membangkitkan dua isu perundangan dalam rayuan itu. Pertama, pesuruhjaya kehakiman telah terkhilaf dalam tafsiran dan penggunaan s 148 Kanun Tanah Sarawak. Yang Arif juga terkhilaf dengan menerima pakai dan menggunakan peruntukan 'sebab yang bertentangan' (*cause to the contrary*) dalam s 256 Kanun Tanah Negara dan bukannya peruntukan 'seperti dalam keadaan yang kelihatan adil' (*in the circumstances seems just*) dalam s 148 Kanun Tanah Sarawak dan terkhilaf kerana berpendapat bahawa tiada merit dalam hujah-hujah perayu dan dengan itu memberikan perintah jualan tanah tersebut. Pesuruhjaya kehakiman sepatutnya menghargai bahawa s 148 Kanun Tanah Sarawak memberikan mahkamah dengan budi bicara yang lebih luas untuk mempertimbangkan keadilan kes daripada s 256 Kanun Tanah Negara dan sewajarnya telah menggunakan bidang kuasa budi bicara yang luas dan mendapati, dengan semua bukti-bukti yang dikemukakan oleh perayu di hadapan mahkamah, bahawa ia bukanlah 'dalam keadaan yang kelihatan adil' untuk memberikan perintah jualan. Kedua, pesuruhjaya kehakiman juga terkhilaf apabila berpendapat bahawa tuntutan perayu tentang penipuan, salah nyata, di bawah pengaruh dan kegagalan pertimbangan sepenuhnya bagi caj itu adalah berdasarkan kaedah dengar khabar sahaja apabila tuntutan tersebut dibuktikan oleh bukti dokumen kontemporari dan laporan penilaian. Fakta kes adalah melalui surat penganugerahan bertarikh 26 April 2013, Jabatan Kerja Raya Malaysia telah menganugerahkan kepada Zecon Bhd ('peminjam') kontrak untuk pembinaan dan penyiapan Hospital Petra Jaya, Kuching, Sarawak ('projek') untuk jumlah kontrak RM495 juta. Melalui surat tawaran bertarikh 27 September 2013, surat tawaran tambahan bertarikh 9 Disember 2013 dan 10 Disember 2013 dan perjanjian kemudahan bertarikh 27 Disember 2013, responden dan dua bank lain (Bank Pembangunan Malaysia Bhd dan Affin Bank Bhd) memberikan jaminan bank, kredit pusingan dan kemudahan surat kredit dalam jumlah keseluruhan RM165 juta ('kemudahan bersindiket sedia ada') kepada peminjam untuk tujuan

membiayai sebahagian pembinaan dan penyiapan projek tersebut. Telah dipersetujui antara responden, kedua-dua bank tersebut ('peminjam bersindiket') dan peminjam bahawa kemudahan bersindiket sedia ada akan dijamin dengan beberapa caj, penyerahan hak dan jaminan. Perayu bukanlah pihak pencagar bagi kemudahan bersindiket sedia ada dan tanah tersebut bukanlah jaminan untuk kemudahan bersindiket sedia ada. Selepas pelaksanaan dan penyempurnaan kemudahan dan dokumen sekuriti tersebut, dari 2013 hingga 2016, responden mengeluarkan jaminan bank berkenaan dengan projek tersebut, mengeluarkan kemudahan kredit pusingan kepada peminjam dan membenarkan pengeluaran sebahagian kemudahan surat kredit. Pada 9 Januari 2017, perayu telah caj tanah tersebut kepada responden. Pelaksanaan dan tujuan caj ini merupakan isu yang menjadi perbalahan di hadapan Mahkamah Tinggi. Perayu berpendapat caj itu bertujuan sebagai jaminan kemudahan tambahan sebanyak RM30 juta yang peminjam telah memohon daripada responden dan yang tidak diberikan oleh responden. Sebaliknya, responden mendakwa caj itu adalah cagaran tambahan untuk kemudahan bersindiket sedia ada sebanyak RM165 juta. Peminjam memungkiri pembayaran balik kepada responden. Melalui surat bertarikh 7 September 2018 daripada responden kepada peminjam, responden menuntut semua wang yang perlu dibayar dan terhutang di bawah kemudahan bersindiket. Melalui surat bertarikh 26 September 2018, responden melalui peguam caranya memberikan notis 30 hari kepada perayu menuntut pembayaran jumlah tertunggak sebanyak RM104,362,841.77 pada 7 September 2018 berserta faedah. Tiada bayaran dibuat oleh perayu. Responden memfailkan saman pemula di Mahkamah Tinggi Kuching untuk perintah jualan tanah yang dicaj perayu di bawah s 148(2)(c) Kanun Tanah Sarawak dan A 83 Kaedah-Kaedah Mahkamah 2012. Perayu menentang saman pemula responden atas alasan bahawa caj telah dilaksanakan dengan salah nyata, pengaruh yang tidak wajar dan kegagalan pertimbangan sepenuhnya. Mahkamah Tinggi membenarkan saman pemula responden dan memberikan perintah jualan. Semasa rayuan, isu-isu yang akan ditentukan adalah: (a) sama ada pesuruhjaya kehakiman telah terkhilaf dari segi undang-undang dan salah arah dirinya dengan menerima pakai dan menggunakan peruntukan s 256 Kanun Tanah Negara dan bukannya s 148 Kanun Tanah Sarawak; (b) sama ada Kanun Tanah Negara terpakai di negeri Sarawak; dan (c) sama ada caj yang diperolehi oleh responden diperoleh melalui cara penipuan, salah nyata dan kegagalan pertimbangan sepenuhnya dan sama ada caj tersebut sah.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Adalah fakta bahawa: (a) perkataan s 256 Kanun Tanah Negara dan s 148 Kanun Tanah Sarawak adalah berbeza; (b) perkataan pada kedua-duanya adalah jelas; (c) s 256 Kanun Tanah Negara hanya terpakai untuk mahkamah di Malaysia Barat manakala s 148 Kanun Tanah Sarawak

terpakai untuk mahkamah di Sarawak; (d) frasa 'sebab yang bertentangan' digunakan pada s 256 Kanun Tanah Negara dan perkataan 'seperti dalam keadaan kelihatan adil' digunakan untuk s 148 Kanun Tanah Sarawak; dan (e) tafsiran s 148 Kanun Tanah Sarawak telah ditubuhkan oleh mahkamah tertinggi. Pada pandangan mahkamah ini, mahkamah di Sarawak mesti terlebih dahulu mengakui perbezaan ini dan menerima hakikat bahawa s 256 Kanun Tanah Negara dengan ujian 'sebab yang bertentangan' tidak terpakai di Sarawak. Oleh itu, mahkamah di Sarawak tidak mempunyai pilihan, tetapi menggunakan ujian 'seperti dalam keadaan yang kelihatan adil' dalam s 148 Kanun Tanah Sarawak (lihat perenggan 22).

(2) Mahkamah mendapati bahawa pesuruhjaya kehakiman telah gagal untuk menggunakan ujian 'seperti dalam keadaan yang kelihatan adil' dan sebaliknya, menggunakan ujian 'sebab yang bertentangan'. Pesuruhjaya kehakiman itu telah terkhilaf dari segi undang-undang dan salah arah dirinya dengan menerima pakai dan menggunakan ujian di bawah s 256 Kanun Tanah Negara yang tidak terpakai di Sarawak. Ini adalah kesilapan undang-undang yang material yang sama dengan salah arah dalam undang-undang. Atas alasan ini sahaja, keputusan itu jelas salah dan mesti diketepikan (lihat perenggan 25).

(3) Penegasan dalam perenggan 9–10 afidavit Hj Zainurin bertarikh 27 Disember 2018 bukanlah kaedah dengar khabar semata-mata kerana perkataan terdahulu 'Saya telah dimaklumkan'. Bertentangan dengan hujah responden, kata-kata ini menunjukkan bahawa deponen telah menerima maklumat atau maklum balas secara langsung daripada rakan sekerjanya tentang pertemuan dan perbincangan antara ejen-ejen perayu dan pegawai-pegawai responden yang telah berlaku di tempat responden pada 6 Disember 2016 dan kejadian sedemikian adalah terbukti benar. Oleh itu, mahkamah mendapati pesuruhjaya kehakiman telah mengambil pendekatan yang mudah dalam isu ini tanpa mengambil kira kepentingannya kepada kes perayu bahawa caj itu diwujudkan sebagai jaminan untuk kemudahan tambahan sebanyak RM30 juta yang diminta (lihat perenggan 30).

(4) Bukti menunjukkan bahawa perayulah yang menawarkan untuk membuat caj bagi kemudahan tambahan sebanyak RM30 juta. Perayu tidak pernah bersetuju untuk membuat caj sebagai jaminan tambahan untuk kemudahan bersindiket sebanyak RM165 juta. Responden berhujah mereka memerlukan caj itu sebagai jaminan tambahan untuk kemudahan bersindiket tetapi gagal mengemukakan sebarang surat untuk menyokong permintaan tersebut. Caj dibuat kerana perayu telah pergi jumpa responden, berharap mendapat kemudahan tambahan RM30 juta bersenjatakan harta bernilai lebih RM100 juta untuk ditawarkan sebagai jaminan kerana mereka amat memerlukan wang

untuk menyiapkan projek itu. Dengan kelakuan mereka menyembunyikan niat sebenar mereka untuk tidak memberikan RM30 juta tetapi mahukan caj tersebut, kami mendapati responden telah bertindak secara tidak wajar terhadap perayu. Urus niaga itu adalah tidak adil kepada perayu. Caj yang diperoleh melalui salah nyata, pengaruh tidak wajar dan kegagalan pertimbangan sepenuhnya bukanlah caj yang sah. Berdasarkan keterangan di hadapan mahkamah, ia bukan seperti dalam keadaan untuk memberikan perintah jualan (lihat perenggan 34).]

Cases referred to

Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793, CA (refd)
Citibank NA v Jong Tze Khiok & Anor [1993] 3 MLJ 449; [1993] 4 CLJ 325, SC (refd)
HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew [2003] 4 CLJ 763, HC (refd)
Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd & Another Appeal [1991] 3 MLJ 163; [1991] 1 CLJ Rep 223, SC (refd)
Llyods Bank Ltd v Bundy [1975] QB 326, CA (folld)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
RHB Bank Bhd v Alom Industries Sdn Bhd [2007] 4 MLJ 438; [2007] 5 CLJ 138, HC (refd)
Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co [1976] 1 WLR 989, HL (folld)

Legislation referred to

National Land Code ss 256, 256(3), 340
Rules of Court 2012 O 83
Land Code (Cap 81) s 148, 148(2)(c)

Appeal from: Originating Summons No KCH-24L-114–11 of 2018 (High Court, Kuching)

Kilat Beriak (Daisy Tham Yek Ngo with him) (Beriak Tham Assoc) for the appellant.
Chan Yin Xi (Adrian Chew with him) (Battenberg & Talma) for the respondent.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the High Court, given at Kuching on 11 September 2019, granting the respondent's application for an order for sale of the appellant's land described as Lot No 14, Block 16, Salak Land District ('the said land').

[2] The appellant raised two legal points. First, the learned judicial commissioner erred in his interpretation and application of s 148 of the Sarawak Land Code. His Lordship also misdirected himself by adopting and applying the provision 'cause to the contrary' of s 256 of the National Land Code instead of the provision of 'in the circumstances seems just' of s 148 and erred in holding that there was no merit in the arguments of the appellant and thereby granting an order for sale of the said land. The learned judicial commissioner ought to have appreciated that s 148 confers the court with a wider discretion to consider the justice of the case than s 256 and accordingly ought to have applied the wide discretionary jurisdiction and found, with all the materials adduced by the appellant before the court, that it is not 'in the circumstances seems just' to grant an order for sale.

[3] Second, the learned judicial commissioner erred in holding that the appellant's claims of fraud, misrepresentation, undue influence and total failure of consideration for the charge are premised solely on hearsay evidence when the said claims are substantiated by contemporary documentary evidence, namely, letter dated 15 December 2016, letter dated 20 December 2016 and the valuation report.

BACKGROUND FACTS

[4] By a letter of award dated 26 April 2013, Jabatan Kerja Raya Malaysia (JKR) awarded to Zecon Bhd (borrower) the contract for the construction and completion of Hospital Petra Jaya, Kuching, Sarawak (the project) for the contract sum of RM495m.

[5] By a letter of offer dated 27 September 2013, supplemental letters of offer dated 9 December 2013 and 10 December 2013 and the facilities agreement dated 27 December 2013, the respondent and two other banks (Bank Pembangunan Malaysia Bhd and Affin Bank Bhd) granted the bank guarantee (BG), revolving credit (RC) and letter of credit (LC/TR) facilities in the total sum of RM165m (the existing syndicated facilities) to the borrower for the purpose of part financing the construction and completion of the said project.

[6] It was agreed between the respondent and the two aforesaid banks (the syndicated lenders) and the borrower that the existing syndicated facilities would be secured by:

(a) a charge over the borrower's BG sinking fund account at the respondent;

(b) an assignment of contract proceeds of the said project by the borrower;

(c) an accounts charge by the borrower over its bank accounts at the respondent;

A (d) an assignment of insurance by the borrower;

(e) deeds of subordination by Dawla Capital Sdn Bhd and Econ Engineering Sdn Bhd;

B (f) a personal guarantee by one Datuk Hj Zainal Abidin bin Hj Ahmad to the respondent;

(g) a corporate guarantee by one Dawla Capital Sdn Bhd to the respondent; and

C (h) an assignment of guarantee by one Zecon Engineering Sdn Bhd.

[7] From para 4 above, it can be seen that the appellant was not a security party for the existing syndicated facilities and the appellant's said land was not a security for the existing syndicated facilities.

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[8] After the execution and perfection of the aforesaid facilities and securities documents, from 2013 until 2016, the respondent issued the BG in respect of the said project, release the RC facility to the borrower and allowed partial drawdown of the LC/TR Facility.

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[9] On 9 January 2017, the appellant charged the said land to the respondent. The execution and purpose of this charge was a contentious issue before the High Court. The appellant contended the charge was intended as a security for additional facility of RM30m the borrower had applied from the F respondent and which the respondent did not grant. On the other hand, the respondent alleged the charge was additional security for the existing syndicated facilities of RM165m.

G **[10]** The borrower defaulted its repayment to the respondent. By a letter dated 7 September 2018 from the respondent to the borrower, the respondent demanded all monies due and owing under the syndicated facilities.

[11] By a letter dated 26 September 2018 from the respondent's solicitors, H Messrs Battenberg & Talma, to the appellant, the respondent through its solicitors gave 30 days' notice to the appellant demanding payment of the outstanding sum of RM104,362,841.77 as at 7 September 2018 together with interest. There was no payment made by the appellant.

I **[12]** On 13 November 2018, the respondent filed Originating Summons No KCH-24L-114–11 of 2018 at the Kuching High Court for an order for sale of the appellant's charged land under s 148(2)(c) of the Sarawak Land Code and O 83 of the Rules of Court 2012.

[13] The appellant opposed the respondent's originating summons on the ground the charge was executed under misrepresentation, undue influence and total failure of consideration.

[14] After considering the affidavit evidence, on 11 September 2019, the learned judicial commissioner (JC) allowed the respondent's originating summons and granted the order for sale.

THE HIGH COURT DECISION

[15] In arriving at his decision, the learned JC made the following findings of facts:

(a) the certificate of indebtedness dated 25 July 2019 shows that the borrower had utilized and enjoyed the facilities;

(b) the facilities were recalled resulting from the borrower's default of the terms of the syndicated loan documentation;

(c) the charged land was charged to the limit of RM165m which was consistent with the terms of the facilities and was supported by the borrower's board of director's resolution in accepting the RM165m facilities which made no mention of RM30m facility;

(d) the appellant's allegation of fraud and misrepresentation was premised on hearsay evidence;

(e) the application to sell charged land is an action in rem and the appellant can ventilate its grouses with an action in personam; and

(f) there is no 'cause to the contrary' to delay the order for sale.

THE FIRST POINT

[16] Learned counsel for the appellant argued that from his grounds of judgment, the learned JC had clearly erred in law and misdirected himself by adopting and applying the provisions of s 256 of the National Land Code ('the NLC') which are not applicable in Sarawak. He submitted that the correct law to be applied in Sarawak is s 148 of the Sarawak Land Code ('the SLC') which provides as follows:

> 148 (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.
>
> (2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court —

A (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for sale of the charged land, and the court after hearing the evidence may
B make such order as in the circumstances seems just.

[17] It is common ground that the power to grant the order for sale under s 148 of the SLC is discretionary as the court has to be satisfied that it seems just in the circumstances to make the order; see *Kuching Plaza Sdn Bhd v Bank*
C *Bumiputra Malaysia Bhd & Another Appeal* [1991] 3 MLJ 163; *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449; [1993] 4 CLJ 325; *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793 and *RHB Bank Bhd v Alom Industries Sdn Bhd* [2007] 4 MLJ 438; [2007] 5 CLJ 138.

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[18] Section 256(3) of the NLC provides that an order for sale 'shall' be made unless the court is satisfied of the existence of cause to the contrary. This section is mandatory in the sense that the court must make such order if there is no cause to the contrary shown by the chargor. The cause to the contrary may
E be established only in three categories of cases: (a) when a chargor is able to bring his case within the exceptions to the indefeasibility doctrine in s 340 of the NLC; (b) when the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; and (c) if the granting of the order for sale is against some rule of law or equity (see *Low Lee Lian v Ban Hin*
F *Lee Bank Bhd* [1997] 1 MLJ 77).

[19] In *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, the Court of Appeal acknowledged that an order for sale under the National Land Code is different from that under the Sarawak Land
G Code and cautioned against application of cases decided under the National Land Code by the courts in Sarawak. At p 800 of the judgment, Gopal Sri Ram JCA said:

> Now, although s 148(3) of the Sarawak Land Code is similar in effect to s 254(1) of the National Land Code (see *Citibank Bhd v Mohamad Khalid bin Farzalur*
H *Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 CL J 739), ss 148(1) and (2) of the former are differently constructed from s 256 of the latter. Under s 148(2) of the Sarawak Code, the court is given a choice of making one of the three orders: the only consideration being that of justice in the circumstances of the case ...
>
> Contrast this with s 256 of the National Land Code ... , the court 'shall' make an
I order for sale unless there is shown 'cause to the contrary' ...
>
> The only reason we make these points is to draw attention to the danger of courts in Sarawak applying decisions under s 256 of the National Land Code, such as *Low Lee Lian* without addressing the differences between the two provisions. They must keep in the forefront of their minds that the section they are dealing with is very

different from that applied by the courts in the State of Malaya. A

[20] Learned counsel for the appellant submitted that the clear wordings of s 148 of the SLC call for more liberal construction than s 256 of the NLC. He therefore submitted that His Lordship's decision which is premised on the wording of s 256 of the NLC is fundamentally wrong in law. B

[21] Learned counsel for the respondent submitted there was no misdirection in law. The question whether the powers granted under s 148 of the SLC confer a wider discretion than that of s 256 of the NLC is irrelevant. C Once the court has determined that the allegation of fraud and misrepresentation were hearsay and not admissible, there was no evidence before the court for the learned JC not to exercise his discretion to grant an order for sale. Thus, it was submitted that there was nothing 'plainly wrong' or inconsistent at all with His Lordship's finding that there was no cause to the D contrary. It is further submitted that the approach taken by the learned JC in this matter is not erroneous and His Lordship had properly directed himself on the law and applied it correctly. The respondent relied on the case of *HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763 as an authority which accorded the phrase 'as in the circumstances seems just' in E the SLC the same interpretation as given to the phrase 'cause to the contrary' in *Low Lee Lian*.

[22] We disagree with the respondent's submission. Our reasons are these. It is a fact that (a) the wordings of s 256 of the NLC and s 148 of the SLC are F different; (b) the wordings of the former and the latter are clear; (c) s 256 of the NLC is applicable to courts in West Malaysia only whilst s 148 of the SLC is applicable to courts in Sarawak; (d) the phrase 'cause to the contrary' apply to s 256 of the NLC and the words 'as in the circumstances seems just' applies to s 148 of the SLC; (e) the interpretation of s 148 of the SLC has been established G by the apex court in *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd & Another Appeal* [1991] 3 MLJ 163; [1991] 1 CLJ Rep 223; *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449; [1993] 4 CLJ 325. To avoid any confusion, in our view, the courts in Sarawak must first acknowledge these differences and accept the fact that s 256 of the NLC with the 'cause to the H contrary' test is not applicable in Sarawak. Therefore, the courts in Sarawak have no option, but to apply the 'as in the circumstances seems just' test in s 148 of the SLC.

[23] With regard to the case of *HSBC Bank Malaysia Bhd v Tan Sri Datuk* I *Amar Ling Beng Siew* [2003] 4 CLJ 763, we find the learned High Court judge in that case was merely giving his opinion that the phrase 'as in the circumstances seems just' should be given a narrow and restrictive interpretation for commercial purposes. Despite his narrow interpretation

approach, in the end, the learned High Court judge applied the correct test of 'as in the circumstances seems just'. At p 772 of the report, the learned High Court judge said:

> Lastly, on the materials before me, has the defendant shown that it would not be 'just in the circumstances' to order a sale of the defendant's shares in the said lands.

[24] Therefore, it is incorrect for the respondent to say *HSBC Bank Malaysia Bhd v Tan Sri Datuk Amar Ling Beng Siew* [2003] 4 CLJ 763 is an authority for the proposition that the Sarawak court have applied the 'cause to the contrary' test. In our view, to interpret the phrase 'as in the circumstances seems just' as having the same meaning with the phrase 'cause to the contrary' is to put words into s 148(2)(c) of the SLC. This approach is wrong. The words of s 148(2)(c) are clear. The role of the court is to give effect to those words. There is no need for the Sarawak court to refer to *Low Lee Lian*'s case when interpreting s 148(2)(c) of the SLC. This is because *Low Lee Lian* deals with s 256(3) of the NLC. In *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, a case on s 148 of the SLC, the Court of Appeal ruled that *Low Lee Lian* is not binding on the Sarawak courts. The Court of Appeal decision in *Century Land Resources* puts paid to the argument put forth by the respondent. Instead, they should refer to decided cases by the apex court on s 148(2)(c) which is binding on the Sarawak courts.

[25] In the present case, we find the learned JC had failed to apply the test of 'as in the circumstances seems just'. Instead, he relied on *Low Lee Lian*'s case and applied the test of 'cause to the contrary' as can be seen at paras 31, 41 & 46 of His Lordship's grounds of judgment. From his grounds of judgment, we agree with the appellant that the learned JC had erred in law and misdirected himself by adopting and applying the test under s 256 of the NLC which is not applicable in Sarawak. This is a material error of law which is tantamount to a misdirection in law. On this ground alone, His Lordship's decision is plainly wrong and must be set aside.

THE SECOND POINT

[26] The appellant from the start has claimed that the charge is not valid because it was procured by means of fraud, misrepresentation and total failure of consideration. To prove their claims, the appellant relied on the affidavit in opposition affirmed by its director, one Hj Zainurin bin Hj Ahmad (Hj Zainurin). There are four affidavits in opposition filed. In paras 9, 10–12 & 15–18 of the first affidavit affirmed on 27 December 2018 (pp 68–78 record of appeal Vol 2A), Hj Zainurin states as follows:

> 9. I was informed by Datuk Zainal bin Haji Ahmad and I verily believe that sometime around the last two weeks of November 2016 he had several discussions with Datuk Maimoonah Mohamed Hussain, the Group Managing Director of the

plaintiff (respondent) and Ms Karmjit Kaur a/p Sarbar Singh, Head of Structured Lending of the plaintiff about the borrower obtaining an additional facility of RM30 million from the plaintiff to expedite the completion of the said project, and in return, the defendant (the appellant) as the borrower's subsidiary would provide the said property as security for the said additional facility. A

10. I was informed by Haji Jamil bin Jamaludin and I verily believe that on or about 6.12.2016, he and Haji Abang Azahari bin Osman of the borrower had a meeting with Ms Karmjit Kaur a/p Sarban Singh and Mr Shahrul Izzan bin Abdul Karim of the plaintiff wherein they, on behalf of the borrower, again applied for an additional facility of RM30 million from the plaintiff to expedite the completion of the said project with its catch up plan. During the said meeting, they made a presentation of the borrower's catch up plan to the plaintiff. In return for this additional facility of RM30 million, the borrower again offered the said property, belonging to the defendant (appellant) herein, as a security for the said additional facility of RM30 million. B C

11. However, the Supplemental Syndicated Agreement, the third party charge over the said property and the Second Supplemental Security Sharing Agreement which were prepared for execution by the borrower and the defendant failed to mention the additional facility of RM30 million applied for by the borrower at all. Upon realizing this, the borrower by letter dated 15.12.2016, requested the plaintiff to review the said Supplementary Syndicated Agreement and third party charge and provide the additional facility of RM30 million on the basis of the security of the third party charge. D E

The borrower's letter dated 15.12.16 was produced as exhibit 'A' and it reads as follows:

ZECON BERHAD F

15th December 2016

Affin Investment Bank Berhad

27th Floor, Menara Boustead, 69, Jalan Raja Chulan,

50200 Kuala Lumpur. G

Attention: Ms Karmjit Kaur

Dear Sir,

SYNDICATED FACILITIES OF UP TO RM165 MILLION

Hospital Petra Jaya Project (HPJ) H

We refer to the draft Supplemental SFA and the other attendant documents comprising the exercise.

At the meeting held at Menara Affin dated 6 December 2016, we had requested that in consideration of our providing additional security, a sum of up to RM30 million would be provided to cater for the catch up plan for the HPJ Project. I

However, we find that this aspect was not catered for in the documentation of the Supplemental SFA nor the third party Charge to be provided by Zecon Capital Ventures Sdn Bhd. We must point out that the land to be provided as additional security is worth more than RM100 million.

Hence, we appeal to you to re-look into the matter and kindly consider providing an additional facility of up to RM30 million as additional facility in exchange for the additional security.

Sign

Haji Zainurin

12. In order to induce the borrower and the defendant to sign the said Supplementary Syndicated Agreement, the Second Supplemental Security Sharing Agreement and the third party charge respectively, the plaintiff by letter dated 20.12.2016 informed the borrower that they would only 'evaluate' the additional facility of RM30 million after the said Supplementary Syndicated Agreement, the Second Supplemental Security Sharing Agreement and the third party charge over the property have been perfected to the satisfaction of the plaintiff.

The plaintiff's letter of 20.12.16 was produced as exhibit 'B' and it reads:

20 December 2016

ZECON BERHAD

8th Floor, Menara Zecon

No.92, Lot 393

Section 5, KLTD, Jalan Satok

93400 Kuching, Sarawak

Attn: Datuk Haji Zainal Abidin Hj Ahmad / Haji Zainudin / En Jamil

Dear Sir,

Borrower: Zecon Berhad

Syndicated Facility: Syndicated Facilities of up to RM165 million Project: Hospital Petra Jaya (HPJ)

Additional Security: Lot No.14, Block 16 of Salak Land District We refer to your letter dated 15 December 2016.

Please be informed that your request for additional facility of up to RM30 million to cover the shortfall in funding requirement for the construction of HPJ project will only be evaluated by the Syndicate Lenders after the charge over the Salak Land as additional security for the Syndicated Facility have been duly perfected to the satisfaction of the Syndicated Lenders.

We wish to seek your kind cooperation to expedite on the execution of the relevant documents and perfection of the charge over the Salak Land latest by 21 December 2016.

Sign	Sign
Karmjit Kaur	Shahrul Izzan

15. The plaintiff by its officers and /or agents, Ms Karmjit Kaur and Shahrul Izzan further represented and warranted that if the borrower and the defendant did not execute the said documents, the plaintiff would not grant to the borrower the additional facility of RM30 million.

16. The borrower and the defendant were thereby induced by the undue influence and/or misrepresentation of Ms Karmjit Kaur and Mr Shahrul Izzan to execute the said documents.

17. The said representation was made fraudulently in that Ms Karmjit and Mr Shahrul Izzan knew it to be false.

18. Neither the plaintiff nor the other Syndicated Lenders granted the borrower the additional facility of RM30 million even after the execution and perfection of the said documents.

[27] In the respondents's affidavit in reply affirmed by Ms Karmjit Kaur a/p Sarbar Singh, the respondent denied the appellant's contention of fraud, misrepresentation and total failure of consideration. Instead, she averred:

(a) paras 9–10 of Hj Zainurin's affidavit dated 27 December 2018 is hearsay evidence and are inadmissible in evidence;

(b) the charge was executed voluntarily;

(c) the respondent never agreed to grant an additional facility of RM30m to the borrower; and

(d) the request for additional security is not only in accord with the terms of the charge documents but also because the respondent fear the borrower could not repay the syndicated facilities as the borrower has failed to complete the project.

[28] On the basis of the preceding words 'I was informed ...' appearing in paras 9–10 of Hj Zainurin's affidavit dated 27 December 18, the learned JC agreed with the respondent and ruled that paras 9–10 of Hj Zainurin's affidavit is hearsay and is inadmissible in evidence. No reason was given for the ruling.

[29] Learned counsel for the appellant argued His Lordship's ruling is wrong in law because the occurence of the meeting and discussion between the appellant's agents and the respondent's officers on 6 December 2016 regarding the appellant's request for additional facility of RM30m was put down in writing in the letter of 15 December 2016 and admitted by the respondent in their letter of 20 December 2016.

[30] We agree with the appellant. In our view, the averments in paras 9–10 are not hearsay simply because of the preceding words 'I was informed'. Contrary to the respondent's contention, these words show that the deponent had received direct information or feedback from his colleague about the meeting and discussion between the appellant's agents and the respondent's officers that had taken place at the respondent's place on 6 December 2016 and such occurrence was proven to be true. Thus, we find the learned JC had taken a simplistic approach on this issue without even considering its importance to

A the appellant's case that the charge was created as security for the additional facility of RM30m requested. The evidence in paras 9–10 forms the foundation of the appellant's case.

B **[31]** In this case, the appellant is challenging the validity of the charge on the ground it was procured by means of misrepresentation, undue influence and total failure of consideration. The appellant claims the charge is not valid. This is a claim in rem. The appellant contended the misrepresentation is in written form. They say the first misrepresentation is that the charge document did not C mention the additional facility of RM30m they had requested. The second misrepresentation is despite stating they will evaluate the appellant's application via their letter of 20 December 2016, the respondent did not evaluate or process the appellant's application for the additional facility of RM30m even after the charge documents had been perfected in favour of the D respondent. In addition, the additional facility of RM30m was not granted to the appellant. Thus, there was total failure of consideration. The respondent admitted they never agreed to grant the additional facility of RM30m. Therefore, when the respondent informed the appellant they will evaluate the appellant's application only after the appellant had perfected the charge, the E respondent knew that if the statement (will evaluate) was false. Therefore, misrepresentation is established. Next, the respondent knew if they (respondent) informed the appellant outright that their application is rejected, the charge could not be created. In order to get the charge registered, the respondent induced the appellant to sign the charge documents first. F Therefore, inducement was proven. So, the charge was for the benefit of the respondent only.

[32] The charge had grave effect on the appellant. The appellant lost its opportunity to use the said land as security to get financial facility from other G financial institutions. The question before this court is: was the respondent's conduct unconscionable? Our answer is yes. And the reason is this. The relationship between the respondent and the appellant is that of banker and customer. As between them, there is no equal bargaining power. The appellant is a weaker party. The English Court recognized the principles of inequality in H bargaining power. In *Llyods Bank Ltd v Bundy* [1975] QB 326, at p 336, Lord Denning said:

> There are cases in which the court will set aside a contract, or transfer of property, when the parties have not met on equal terms — when one is so strong in bargaining power and the other so weak — that, as a matter of common fairness, it is not right I that the strong should be allowed to push the weak to the wall.
>
> Further down, at p 339, His Lordship said:
>
> The English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by

reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other ...

[33] In *Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co* [1976] 1 WLR 989 at p 995 Lord Wilberforce said:

No contracts are made in a vacuum: there is always a setting in which they have to be placed ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[34] Applying the law in *Llyods Bank* and *Reardon Smith*'s case to the facts of this case, we find that the evidence before the court shows it was the appellant who offered to create a charge for additional facilities of RM30m. That is clear to us. The appellant never agreed to create a charge as additional security for the syndicated facilities of RM165m. The respondent contended they required the charge as an additional security for the syndicated facilities. But, they failed to produce any letter to support such request. Accordingly, the appellant's version which is supported by the letter of 15 December 2016 is to be preferred. It is this. The charge came about because it was the appellant who approached the respondent, hopeful to get the additional facility of RM30m armed with property worth more than RM100m to offer as security because they are in dire need of money to complete the project. By their conduct of concealing their true intention of not granting the RM30m but wanting the charge, we find the respondent had acted unconscionably towards the appellant. The transaction was unfair and unjust to the appellant. A charge obtained by means of misrepresentation, undue influence and total failure of consideration is not a valid charge. Based on the evidence before the court, we find that it does not seem just in the circumstances to grant an order for sale.

[35] For the aforesaid reasons, we allowed the appeal and set aside the order of the High Court with costs of RM10,000 here and below to the appellant subject to allocator.

Appeal allowed with costs; and High Court order set aside.

Reported by Rafinie Ramli